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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

MAXIMILIAN KLEIN, et al.,

Plaintiffs,

vs.

META PLATFORMS, INC.,

Defendant.

This Document Relates To: All Consumer
Actions

Consolidated Case No. 3:20-cv-08570-JD

**CONSUMER PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR CLASS
CERTIFICATION AND APPOINTMENT
OF CLASS COUNSEL**

The Hon. James Donato

Hearing Date: Dec. 14, 2023 at 10:00 a.m.

**REDACTED VERSION FILED
PUBLICLY**

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 14, 2023, at 10:00 a.m., before the Honorable James Donato, of the United States District Court of the Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California, Courtroom 11, 19th Floor, Plaintiffs Maximillian Klein, Sarah Grabert, and Rachel Banks Kupcho (“Consumers”), on behalf of themselves and all others similarly situated, hereby move the Court for an order granting their Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23.

Consumers seek entry of an order: (1) certifying a proposed Rule 23(b)(3) class (“Consumer Class”); (2) appointing Consumers Dr. Klein, Ms. Grabert, and Ms. Banks Kupcho as representatives of the Consumer Class; and (3) appointing Kevin Y. Teruya, of Quinn Emanuel Urquhart & Sullivan, LLP, and Shana E. Scarlett, of Hagens Berman Sobol Shapiro LLP, as Co-Lead Consumer Class Counsel.

Consumers propose that the Court certify the following Consumer Class:

All persons in the United States who maintained and used a Facebook profile at any point from December 3, 2016 to December 3, 2020. Excluded from the Class are: (1) Defendant Meta Platforms, Inc. (“Meta”), any entity in which Meta has an interest, any of Meta’s corporate parents, affiliates, subsidiaries, officers, directors, legal representatives, successors and assigns; (2) any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff; and (3) any juror assigned to this action.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, all filed supportive declarations and exhibits, the records, pleadings, and other documents on file in this consolidated action, and any argument that may be presented to the Court.

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24	6 Newberg and Rubenstein on Class Actions § 20:28 (6th ed.)	20
25	Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> , § 782b	5

TABLE OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Referenced Document</u>
Ex. __	All exhibit references are to the Declaration of Kevin Y. Teruya in Support of Consumer Plaintiffs' Motion for Class Certification and Motion to Exclude Portions of the Expert Report and Testimony of Dr. Catherine Tucker, concurrently filed herewith.
Economides ¶ __	Expert Class Certification Report of Dr. Nicholas Economides, concurrently filed herewith.
Economides Reply ¶ __	Reply Expert Class Certification Report of Dr. Nicholas Economides, concurrently filed herewith.
Farrell ¶ __	Expert Class Certification Report of Dr. Joseph Farrell, concurrently filed herewith.
B. Klein ¶ __	Expert Class Certification Report of Robert L. Klein, concurrently filed herewith
B. Klein Reply ¶ __	Reply Expert Class Certification Report of Robert L. Klein, concurrently filed herewith.
Lamdan Decl. ¶ __	Expert Class Certification Report of Professor Sarah Lamdan, concurrently filed herewith.
Lamdan Reply ¶ __	Reply Expert Class Certification Report of Professor Sarah Lamdan, concurrently filed herewith.
Scarlett Decl.	Declaration of Shana E. Scarlett in Support of Consumer Plaintiffs' Motion for Class Certification, filed concurrently herewith.
Teruya Decl.	Declaration of Kevin Y. Teruya in Support of Consumer Plaintiffs' Motion for Class Certification, filed concurrently herewith.
Tucker ¶ __	Expert Class Certification User Rebuttal Report of Facebook Expert Dr. Catherine Tucker, concurrently filed herewith.
Fair ¶ __	Expert Class Certification Report of Facebook Expert Rebecca Kirk Fair, concurrently filed herewith.
M. Klein ¶ __	Declaration of Named Consumer Plaintiff Maximilian Klein in Support of Consumer Plaintiffs' Motion for Class Certification, concurrently filed herewith.
Grabert ¶ __	Declaration of Named Consumer Plaintiff Sarah Grabert in Support of Consumer Plaintiffs' Motion for Class Certification, concurrently filed herewith.
Banks Kupcho ¶ __	Declaration of Named Consumer Plaintiff Rachel Banks Kupcho in Support of Consumer Plaintiffs' Motion for Class Certification, concurrently filed herewith.

STATEMENT OF ISSUES TO BE DECIDED

The issues to be decided with respect to Consumers' Motion are:

1. Should this Court certify this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, given the predominance of common questions of fact and law, including:
 - a. A personal social network market definition Facebook concedes can be proven by common evidence, including internal Facebook documents, executive testimony, and the testimony of two experts on behalf of the Consumer Class;
 - b. Monopoly power Facebook concedes can be proven by common evidence, including indirect and direct evidence and the testimony of an expert economist;
 - c. Antitrust impact, demonstrated by evidence common to the Common Class of a continuous course of deceptive conduct by Facebook regarding data collection, use, privacy, and security (which Facebook concedes can be proven by common evidence), and the ensuing consumer harm; and
 - d. A damages model informed by 12 separate, real-world yardsticks that support a damages methodology to calculate both class-wide and individual damages?
2. Should this Court appoint Consumer Class representatives Maximilian Klein, Sarah Grabert, and Rachel Banks Kupcho as Representatives of the proposed Consumer Class, where they have served ably for the past three years of this litigation, have produced thousands of pages of documents, been deposed, and spent countless hours cooperating with Class Counsel regarding the prosecution of this litigation?
3. Should this Court make permanent the appointment of Kevin Y. Teruya and Shana E. Scarlett as Co-Lead Consumer Class Counsel, pursuant to Rule 23(g) of the Federal Rules of Civil Procedure?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Named Consumer Plaintiffs Maximilian Klein, Sarah Grabert, and Rachel Banks Kupcho seek certification of the proposed Consumer Class, a Rule 23(b)(3) damages class consisting of all individuals in the United States that maintained and used a Facebook profile between December 3, 2016 and December 3, 2020 (the four-year period before the filing of the first complaint).

Every issue here will be resolved class-wide. The liability inquiry turns exclusively on Facebook’s uniform actions across the Consumer Class and the market, and on evidence common to the Class. Facebook did not take any individualized action against any individual class member in creating its monopoly of the Personal Social Network (“PSN”) Market—the relevant market in this case. No other competitor even comes close to Facebook.

Facebook gained its monopoly by promising users the best data collection, use, security, and privacy practices. Facebook made these promises intentionally, [REDACTED]

[REDACTED]
Ex. 19 (PALM-002469803 at Slide 14). As Facebook knows and [REDACTED]

[REDACTED] Ex. 41 (PALM-012991911 at -914)

([REDACTED]

[REDACTED]

[REDACTED]).

What users did not know during or after Facebook’s meteoric rise to market dominance, was Facebook’s uniform and prolonged deception regarding its data collection and use practices. This systemic set of deceptions and omissions enabled Facebook to obtain and maintain monopoly power. And, while Facebook materially misled the public and the market, internally it knew these public portrayals of its data practices were hugely problematic and contrary to the truth.

Mr. Zuckerberg, for example, has spent years publicly promising that Facebook users have complete control over their data. But, [REDACTED]

[REDACTED]

1 [REDACTED]
2 [REDACTED] Ex. 42 (PALM-013003886)
3 (emphasis in original). A former economist at Facebook [REDACTED]
4 [REDACTED]
5 [REDACTED] See Ex. 63 at 115:3–119:10
6 (Cunningham Tr.); Ex. 29 (PALM-009048148). Facebook entered into a consent decree with the FTC
7 in 2011 for misrepresenting its data practices, and then in 2019 paid a **\$5 billion fine** and entered into
8 a new one after surreptitiously violating the first one. The FTC is investigating whether Facebook is
9 now violating the 2019 consent decree too. [REDACTED] Facebook’s now COO—Javier Olivan—[REDACTED]
10 [REDACTED]
11 [REDACTED] Ex. 47 (PALM-016517685 at -691).

12 Facebook itself conceded in expert discovery that proof of the relevant market, monopoly
13 power, and Facebook’s deception all depend on common evidence. Common evidence also shows
14 that Facebook’s market distortions deprived every class member of compensation for their data, thus
15 harming every single one. This common evidence further shows real-world examples where
16 Facebook and other companies compensated users for the exact sort of data at issue here, providing
17 real world valuations *by Facebook* of the user data it anticompetitively obtained. This provides
18 Consumers a straightforward damages model that calculates both aggregate and individual damages,
19 because they can use those yardsticks (as well as other real-world yardsticks) to calculate the amount
20 Facebook would have compensated them in the but-for world. In short, predominance here is clear-
21 cut and overwhelming—the exact sort of record appropriate for class treatment.

22 All this common evidence shows that Consumers’ claims proceed on central, common
23 questions that are capable of class-wide resolution. In the end, Consumers meet each Rule 23(a)
24 requirement for class certification. *First*, numerosity exists because there are millions of Consumer
25 Class members. *Second*, Consumers’ claims present many clearly common legal and factual
26 questions. *Third*, Consumers’ claims are typical of the claims of all class members—they bring the
27 same legal claims, against the same defendant, based on the same conduct and legal theories, resulting
28 in the same type of injury. *Fourth*, the named Consumers are adequate class representatives: their

interests and those of the Consumer Class are fully aligned; they have doggedly pursued this case for several years against Facebook; and they are represented by well-qualified counsel who satisfy Rule 23(g). **Finally**, both predominance and superiority are satisfied by the uniform evidence and answers on Facebook’s liability and class-wide harm and the economic and complex legal hurdles in bringing any individual case here.

II. THE PROPOSED CONSUMER CLASS

The proposed Consumer Class definition is: **All persons in the United States who maintained and used a Facebook profile at any point from December 3, 2016 to December 3, 2020.** Excluded from the Class are: (1) Defendant Meta Platforms, Inc. (“Meta”), any entity in which Meta has an interest, any of Meta’s corporate parents, affiliates, subsidiaries, officers, directors, legal representatives, successors and assigns; (2) any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff; and (3) any juror.

Consumers seek to certify the claims alleged in Counts I–II of the operative complaint (Section 2 claims for monopolization and attempted monopolization of the PSN Market). Dkt. 87. The proposed class definition differs slightly from the one in the complaint. **First**, to conform to the portion of the motion to dismiss order addressing the damages period, Consumers seek to certify a Consumer Class that begins on December 3, 2016 (*i.e.*, four years before the original complaint), although the relevant conduct period of Facebook’s continuing violation goes back to January 1, 2007. Dkt. 214 at 55–58. **Second**, the putative Consumer Class is limited to those Facebook users in the United States who “maintained and used” a Facebook profile during the damages period.

III. PROFFER OF FACTS COMMON TO THE CONSUMER CLASS

Evidence common to the Consumer Class, establishes each element of Consumers’ claims, including (1) the possession of monopoly power in the relevant market, (2) the willful maintenance of that power by anticompetitive means, and (3) antitrust injury. *See Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020). Consumers will prove their claims with common documents, data, testimony, and other evidence from Facebook and non-parties. They also support their claims with four expert opinions of: **Dr. Nicholas Economides** (relevant market definition, monopoly power, anticompetitive conduct, antitrust injury, and damages); **Dr. Joseph Farrell**

(relevant market definition); **Robert Klein** (survey evidence regarding the materiality of Facebook’s deception to consumers); and **Prof. Sarah Lamdan** (academic and industry research shows consumers care about collection, use, sharing, and privacy of their data).¹

A. Common Evidence on Facebook’s Monopoly Power in the Relevant Market

Facebook does not truly dispute that the question of market definition and monopoly power are questions common to the Class. Consumers have offered two separate antitrust economists to testify to the existence of the market and Facebook’s monopoly power (Drs. Economides and Farrell). Neither of Facebook’s expert contest these showings. Tucker ¶ 25; Fair ¶ 1 n.2.

First, Dr. Economides performed several widely accepted qualitative and quantitative analyses demonstrating the existence of the PSN Market. These include a small but significant non-transitory increase in price (“SSNIP”) test, and a small but significant non-transitory decrease in quality (“SSNDQ”) test. Economides ¶¶ 20–25, 35–211. Dr. Farrell offers similar testimony about the relevant market, using similarly well-accepted methods, such as a critical loss analysis based on available aggregate diversion ratio and profit margin data. Farrell ¶¶ 16–20, 50, 90–107. These formal economic tests are supported by reams of record evidence indicating that industry participants and Facebook executives alike considered personal social networks to be the critical relevant market. *E.g.*, Economides ¶¶ 72–206 (describing common record evidence).

Second, evidence common to the Class confirms Facebook holds monopoly power in the PSN Market. Monopoly power is typically assessed in two ways: (1) through direct evidence, such as a firm’s ability to sustain supra-competitive profits or degrade product quality; and (2) circumstantially, by calculating the firm’s market share within the relevant market and evaluating barriers to entry. Economides ¶¶ 32–34. The common record, and the analyses Dr. Economides conducted based on the common record, show that both types of evidence demonstrate Facebook’s monopoly power in the PSN Market. *Id.* ¶¶ 212–252. Facebook accepts Dr. Economides’ opinions regarding monopoly

¹ Facebook was in gross violation of the discovery deadlines in this case, producing the bulk of data only two months before the close of fact discovery, and 95,702 documents (over 747,000 pages) after the cut-off. Scarlett Decl., Exs. 2–3. Given these extraordinarily late productions, Consumers’ experts may incorporate additional data and information into their merits reports. However, their class certification reports handily demonstrate the basis for certification, as discussed below.

1 power for purposes of class certification. Tucker ¶ 25.

2 **B. Common Evidence of Facebook’s Anticompetitive Conduct**

3 In a monopolization case, the evidence of wrongdoing centers entirely on the defendant. *In re*
4 *Neurontin Antitrust Litig.*, 2011 WL 286118, at *6 (D.N.J. Jan. 25, 2011). This is certainly true here:
5 Facebook engaged in a decade-long campaign to dupe the market regarding its data practices.

6 At the motion to dismiss stage, Judge Koh applied the Ninth Circuit’s test in *American Prof’l*
7 *Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Pubs., Inc.*, 108 F.3d 1147 (9th
8 Cir. 1997), which held that under certain circumstances, a company’s “false and misleading
9 advertising” may “constitute[] exclusionary conduct” for purposes of the Sherman Act. *Id.* at 1152.
10 Other courts have looked to whether the alleged deception has harmed competition. *E.g.*, *United*
11 *States v. Microsoft Corp.*, 253 F.3d 34, 77 (D.C. Cir. 2001) (deception was anticompetitive where
12 “Microsoft offers no procompetitive explanation for its campaign to deceive developers”). Consumers
13 contest whether the elements of *Harcourt Brace*’s framework constitute the proper legal test to apply,
14 but note that even this legal question itself is common to the Class. Regardless, even the *Harcourt*
15 *Brace* line of cases demonstrates how common evidence supports Consumers’ claims in this case.
16 Specifically, “false and misleading advertising” can establish a Sherman Act claim if the defendant
17 monopolist made representations about its own products or its rivals’ products that: (1) continued for
18 prolonged periods; (2) were clearly material; (3) were clearly false; (4) were clearly likely to induce
19 reasonable reliance, (5) were made to buyers without knowledge of the subject matter, and (6) were
20 not readily susceptible of neutralization or other offset by rivals. *Harcourt*, 108 F.3d at 1152; Ex. 8,
21 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 782b (explaining that a “monopolist’s
22 misrepresentations encouraging the purchase of its product can fit our general test for an exclusionary
23 practice when the impact on rivals is significant”) (citing this case). Proof of these elements, even if
24 the correct ones to apply, clearly relies on evidence common to the Class.

25 **1. Facebook has continuously misrepresented and failed to disclose its data**
26 **practices to the Class.**

27 The breadth and ubiquity of Facebook’s uniform public statements and omissions regarding
28 its data practices makes this a quintessential common question. Since its inception, Facebook has
embarked on a public campaign of promising users control, safety, and security of their data. Ex. 17

1 is a chart of illustrative statements and omissions Facebook has made since 2006 regarding its data
2 practices. But even these do not present the full picture. [REDACTED]

3 [REDACTED] Ex. 39
4 (PALM-012846445 at -447); Ex. 36 (PALM-012003899 at Slide 4).

5 To support this constant campaign of (mis)representations, Facebook maintained a large
6 marketing and communications department that constantly evaluated Facebook's messaging
7 regarding data collection and use issues. That team [REDACTED]

8 [REDACTED]
9 [REDACTED] Ex. 24 at
10 Slides 2, 10–11 (PALM-004235531).² Its former Director—[REDACTED]—urged that [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED] Ex. 30 (PALM-009278820). Facebook has blanketed the market with statements and

14 omissions regarding its data practices to the public since its inception, all common to the Class.

15 **2. Data practices are clearly material to the average consumer and to**
16 **competition in the PSN Market.**

17 Facebook tethered its public statements to a message of data control, safety, and security and
18 did not disclose its substantial shortcomings for a reason—[REDACTED]

19 [REDACTED] Ex. 35 (PALM-
20 011140935). Facebook readily acknowledges this consumer preference. Mr. Zuckerberg has stated
21 that: “[t]he **No. 1 thing that people care about is privacy and the handling of their data.**” Ex. 11
22 at 5. Facebook's website today emphasizes that “[w]e have dedicated teams and processes to help us
23 do privacy well **because it's important to people and our business**” and “[p]rotecting users' data
24 and privacy is **essential to our business.**” Ex. 9.

25 During their depositions in this case, Facebook executives acknowledged time and again t [REDACTED]
26 [REDACTED] Michel Protti—Facebook's Chief Privacy Officer
27 for Product—[REDACTED]

28 ² All emphasis is added, unless otherwise indicated.

1 [REDACTED] Ex. 67 at 120:2–8 (Protti Tr.). Dave Wehner—Facebook’s former CFO and current Chief
2 Strategy Officer—explained [REDACTED]

3 [REDACTED] Ex. 70 at 72:7–73:7 (Wehner Tr.). Guy Rosen—Facebook’s Chief Information Security
4 Officer—likewise testified that [REDACTED]

5 [REDACTED] Ex. 68 at 210:13–18 (Rosen Tr.). Facebook
6 further recognized that when its users were given the choice on Apple devices to not have Facebook
7 track them, **nearly** [REDACTED]

8 [REDACTED]
9 [REDACTED] Ex. 54 (PALM-017069195 at -197). Facebook’s Marketing & Insights team likewise concluded
10 [REDACTED]

11 [REDACTED] Ex. 18 (PALM-002447238).

12 Consumers offer testimony from two experts to confirm what is evident in Facebook’s
13 documents, that consumers consider privacy and data issues material. Consumers’ expert, Robert
14 Klein, designed, conducted, and analyzed a survey to measure the degree of importance U.S.-based
15 Facebook users place on knowing how Facebook may collect or use their data. B. Klein ¶ 10. His
16 survey asked a representative sample of respondents to rank “[h]ow important or unimportant is it for
17 you to know the following in deciding whether or not to use a social network” for a series of data
18 practices by an unnamed social network, which are at issue in this case. *Id.* ¶¶ 15–21, 24, 37, 38. Mr.
19 Klein’s survey showed **between 71 to 89 percent** of respondents found it “very important” or
20 “somewhat important” to know about the types of data practices Facebook deceived about:

Importance that Facebook users place on knowing how a social network may collect or use their personal data when deciding whether or not to use a social network:	
The social network could:	Users considered important
Allow other companies to read your private messages within the social network app.	89.0%
Allow advertisers to use your phone number to send you targeted advertisements.	84.9%
Collect your personal data from your mobile device even while you were using other websites and apps.	88.2%
Collect your contact list stored on your mobile device.	87.8%
Let other companies see your profile information and activity even if you did not use their apps.	85.1%
Let other companies use your personal data to send targeted political advertisements, even if you did not use their apps.	84.2%
Use your online shopping and web browsing history from other apps and websites	74.7%

1	to sell targeted advertising.	
2	Use your activity within the social network service to target and sell advertisements.	70.7%

3 B. Klein ¶¶ 42, 46, Summary Table 2A, Table 2B. These results (common to the Class) show that
4 “Facebook users place a high degree of importance on knowing how a social network may collect or
5 use their personal data when deciding whether or not to use a social network.” B. Klein ¶ 47.

6 Next, Consumers offer the opinions of Professor Sarah Lamdan, whose “specialties include
7 data privacy with a focus on the implications of the use of personal data to target consumers and to
8 assess consumer risk.” Lamdan ¶ 2. She has also worked with various privacy advocacy organizations
9 to assess the privacy risks posed by various online platforms’ collection and use of consumers’ data
10 and testified to Congress. *Id.* ¶ 4. Based on her work, Prof. Lamdan explains the vast body of research
11 and academic work underlying her opinions that online privacy and control over data are material to
12 consumers, and which Facebook’s own documents confirm. Lamdan ¶¶ 13–46, 70–82; Lamdan Reply
13 ¶¶ 6–9, 15–17, 25–33, 43–52. All of this evidence—Facebook’s internal documents, employee
14 testimony, and expert opinion—is common to the Class.

15 It bears noting that not every consumer needs to value data in the exact same way for this
16 anticompetitive result to take hold. All that matters is a sufficient number of consumers *do* highly
17 value their data, such that data practices act as a competitive driver between PSNs. Economides ¶
18 401; Economides Reply ¶¶ 110–18. As the common proof shows, this is exactly the case—a huge
19 number of PSN users value their data enough to make data practices a key competitive driver in the
20 PSN Market. Ex. 45 (PALM-014362572 at -573) ([REDACTED])

21 [REDACTED] By deceiving the market as to its own data practices, Facebook
22 deprived its competitors of the ability to cut into its monopoly power in any meaningful way.

23 **3. Facebook’s statements and omissions regarding its data practices were** 24 **false and misleading.**

25 The determination of the falsity of Facebook’s data-related statements and omissions will be
26 answered class-wide with common evidence. This issue is a quintessential question of liability and
27 would not require individualized inquires as to any class member. Although Consumers do not need
28 *prove* their falsity for class certification, below are illustrative examples of Facebook’s long history

1 of deceptive and misleading commitments and the common proof Consumers will use at trial.

2 **Beacon.** In November 2007, Facebook introduced its “Beacon” feature, which allowed
 3 Facebook to obtain data from users regarding their purchases off Facebook and provided a pop-up
 4 allowing users to opt in to sharing this information. Facebook’s then-Vice President of User
 5 Growth—Chamath Palihapitiya— Facebook would “[a]bsolutely not” receive data about the user’s
 6 purchase if they did not opt in. Ex. 4 (CONSUMER-FB-0000044206 at -207). Internally, [REDACTED]
 7 [REDACTED]
 8 [REDACTED] Ex. 28
 9 (PALM-008881801); *see also* Ex. 22 (PALM-003823269) [REDACTED]
 10 [REDACTED]).

11 **Social Plug-Ins and Cookies.** In April 2010, Facebook introduced “social plug-ins,” such as
 12 the “Like button,” on third-party websites that allowed that activity to be shared to the user’s
 13 Facebook page. Facebook stated that [REDACTED]
 14 [REDACTED] Ex. 49 (PALM-016881862). [REDACTED] Erin
 15 Egan (Facebook’s Chief Privacy Officer for Policy) advised then-COO Sheryl Sandberg and other
 16 executives that: [REDACTED]

17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] *Id.*; Ex. 64 at 114:1–116:5 (Egan Tr.) ([REDACTED]
 21 [REDACTED]).

22 Between May and September 2011, various Facebook employees—including Facebook’s
 23 then-CTO Bret Taylor—also promised that Facebook does not use “cookies” for tracking or
 24 advertising. Ex. 5 (CONSUMER-FB-0000044208 at -209); Ex. 6 (CONSUMER-FB-0000044213 at
 25 -214). [REDACTED] Facebook’s PR team [REDACTED]
 26 [REDACTED] Ex. 56 (PALM-FTC-
 27 00001385 at -387). Moreover, Facebook months earlier [REDACTED]
 28 [REDACTED]

1 **Two-Factor Authentication.** In 2011, Facebook introduced two-factor authentication, which
 2 allowed users to input their phone numbers to receive a one-time password or key code to make
 3 logging in more secure. Facebook represented its 2FA measure was “a new feature to help prevent
 4 unauthorized access to your account” and is “additional security” which “helps confirm that it’s really
 5 you trying to log in.” Ex. 15. Facebook did not [REDACTED]
 6 [REDACTED]. Ex. 78 at 253:16–24 (Parikh Tr.). Facebook
 7 recognized [REDACTED]
 8 [REDACTED] Ex. 50 (PALM-016904790 at -798).

9 **Sharing Data with Third Parties.** Facebook has maintained various application programming
 10 interfaces that allow third parties like software developers and hardware device makers to access
 11 users’ data. Historically, third parties had been able to access the data not only of a Facebook user,
 12 but also of the user’s *friends*, even if they themselves never used the third party’s product. In April
 13 2014, Mr. Zuckerberg publicly announced Facebook would end third parties’ access to “friends data”
 14 because “this is a really important step for giving people power and control over how they share their
 15 data with the apps.” Ex. 7 (CONSUMER-FB-0000044232 at -233).

16 Mr. Zuckerberg chose to not mention that Facebook would [REDACTED]
 17 [REDACTED] Ex. 61 at 79:5–
 18 22 (Chang Tr.). Facebook did exactly that, entering into more than 60 partnerships that allowed
 19 certain device makers and software developers continued access to “friends data” until at least 2018.
 20 Ex. 2 (CONSUMER-FB-0000001857). After [REDACTED], Facebook [REDACTED]
 21 [REDACTED] See Ex. 23 (PALM-
 22 003961720 at -720) ([REDACTED]
 23 [REDACTED]
 24 [REDACTED]).

25 **Cambridge Analytica.** In late 2015, [REDACTED]
 26 [REDACTED]
 27 [REDACTED] Ex. 44 (PALM-013086782). In 2018, after news reports that
 28 Cambridge Analytica had ultimately accessed Facebook users’ data in connection with the 2016 U.S.

1 Presidential Election, Facebook announced that “the Facebook information of up to 87 million people
2 – mostly in the US – may have been improperly shared with Cambridge Analytica.” Ex. 14. That
3 same month, [REDACTED]

4 [REDACTED] Ex. 33
5 (PALM-010595431). In the scandal’s aftermath, Facebook’s then-Director of Marketing Insights
6 urged the then-Chief Marketing Officer that [REDACTED]

7 [REDACTED]
8 [REDACTED] Ex. 21 (PALM-003543014). During his deposition, Mr. Zuckerberg
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] Ex. 73 at 39:12–24, 41:22–42:2 (Zuckerberg Tr.).

12 ***App Developer Investigation.*** Following the Cambridge Analytica scandal, Facebook [REDACTED]
13 [REDACTED]

14 Ex. 55 (PALM-ADI-0000653883 at -884); Ex. 62 at 24:12–25:12 (Chen Tr.). [REDACTED]
15 [REDACTED] Ex. 62 at 92:21–23, 95:6–

16 14. [REDACTED]
17 [REDACTED]³ *Id.* at 92:24–93:2, 100:1–18, 103:24–104:8. [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 *Id.* at 59:4–70:21; Ex. 12 at 12–13 (Facebook presentation); Ex. 13 (Senate letter).

21 ***Commitment Review.*** In 2020, Facebook launched its “Commitment Review” effort, which
22 seeks to: [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Ex. 39 (PALM-012846445 at -447); Ex. 69 at 13:19–15:12, 27:7–29:22 (Stefancik Tr.).

26 Facebook’s corporate designee [REDACTED]
27 [REDACTED]

28 ³ Mr. Olivan (Facebook’s now-COO) called Facebook Platform [REDACTED]
[REDACTED] Ex. 25 (PALM-004257464 at -465–66).

1 [REDACTED] Stefancik Tr. at
 2 22:13–24, 59:2–60:5, 91:2–17. [REDACTED]

6 [REDACTED] Ex. 51 (PALM-017036460 at -464–65, -486).

7 [REDACTED] Mr. Zuckerberg publicly made the exact latter commitment in April 2018.⁴ Ex. 16 (Wired
 8 Article). [REDACTED]

10 [REDACTED] Ex. 69 at 73:2–74:11 (Stefancik Tr.) & Ex. 53 (PALM-017042708 at -719) [REDACTED]

11 [REDACTED]; Ex. 52 (PALM-017042298 at -299) [REDACTED]

13 **4. Facebook’s statements on data and privacy practices were clearly likely
 14 to induce reliance.**

15 Facebook knew it needed consumers’ trust to establish and maintain its dominance. As Prof.
 16 Lamdan explained (citing internal documents), “Facebook recognized that concepts of control and
 17 privacy are directly related to how much consumers trust Facebook” and thus their use of Facebook.

18 Lamdan ¶ 17. The company recognized [REDACTED]

[REDACTED] Ex. 43 (PALM-013008413 at -415).

19 Externally, Facebook likewise stated that [REDACTED]

20 [REDACTED] Ex. 40 (PALM-
 21 012965558). The common evidence here shows that to maintain this trust, and its monopoly power,
 22 Facebook carefully crafted its messaging regarding its data practices to induce its users’ reliance.

23 The company recognized the magnitude of [REDACTED]

25 [REDACTED] Ex. 38 (PALM-
 26 [REDACTED])

27 ⁴ Contrary to Mr. Zuckerberg’s statement, [REDACTED]

28 [REDACTED] Ex. 48 (PALM-016555802).

1 012841182 at -185). That is why, [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Ex. 72 at 69:4–70:15 (Weinstein Tr.). Internally,
 4 Facebook recognized that [REDACTED]
 5 [REDACTED]
 6 [REDACTED] Ex.
 7 46 (PALM-015654588) (emphasis in original). Elsewhere, the company acknowledged [REDACTED]
 8 [REDACTED]
 9 [REDACTED] Ex. 47 (PALM-016517685 at -686). Industry analysts
 10 likewise [REDACTED]
 11 [REDACTED] Ex. 26 (PALM-005598229).

12 **5. Facebook intentionally caused and benefitted from the market’s lack of**
 13 **understanding regarding Facebook’s actual data practices.**

14 Facebook’s campaign of deception regarding its claimed data practices was made all the more
 15 successful by the market’s (and consumers’) lack of understanding of Facebook’s true practices,
 16 which Facebook knew. Document after document from Facebook demonstrates that [REDACTED]
 17 [REDACTED]
 18 [REDACTED] For example, [REDACTED]
 19 [REDACTED] Ex. 34 (PALM-010644865).

20 Prof. Lamdan likewise reviews a slew of executive testimony and materials from Facebook
 21 insiders that [REDACTED]
 22 [REDACTED]
 23 [REDACTED] See Lamdan Reply ¶¶ 57–82 [REDACTED]
 24 At his deposition, former Facebook employee and WhatsApp co-founder Brian Acton recognized [REDACTED]
 25 [REDACTED] Ex. 59. at
 26 152:16–22 (Acton Tr.). Mr. Acton likewise explained that [REDACTED]
 27 [REDACTED]
 28 [REDACTED] Id. at 167:23–168:13. Mr. Acton’s testimony is consistent with other common proof that

1 makes clear [REDACTED]
 2 [REDACTED] *E.g.*, Ex. 37 (PALM-012266626 at -627) [REDACTED]
 3 [REDACTED]
 4 [REDACTED]; Ex. 31 [REDACTED]
 5 [REDACTED] Consumers, then, cannot know the full extent of
 6 Facebook’s practices. Mr. Zuckerberg and his team recognized in 2018 that users [REDACTED]
 7 [REDACTED] Ex. 27 (PALM-
 8 006273517 at -519). As Prof. Lamdan explains, [REDACTED]
 9 [REDACTED]

10 **6. Facebook’s statements to users and the market were not readily offset or**
 11 **overcome by rivals.**

12 Facebook’s statements and omissions to the market on its data practices were not readily
 13 neutralized, and they in fact actively undermined rivals. Common evidence here shows that Facebook
 14 gained market share in the early 2000s precisely because of its supposed focus on privacy and data
 15 security, which competitively differentiated it from other then-existing personal social networks.
 16 Economides ¶ 317 n.452 (collecting deposition testimony). A 2008 internal memo entitled “[REDACTED]
 17 [REDACTED]
 18 [REDACTED] Ex. 20 (PALM-003182426). Facebook then maintained this public façade, even though
 19 its CEO, Mark Zuckerberg, derogatorily referred to Facebook users as “dumb [expletives]” for
 20 willingly sharing their data with Facebook. Ex. 1; *see also* Ex. 74 (PALM-006006351) [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

23 Evidence, common to the Class, further shows that even after the initial defeat of MySpace,
 24 Facebook continued to undermine rivals through its constant campaign of deception. *See* Economides
 25 ¶¶ 322–34 (defeat of Myspace), 335–48 (defeat of Google+), 349–57 (defeat of MeWe); Economides
 26 Reply ¶¶ 72–80 (defeat of Snapchat). Snapchat testified that [REDACTED]
 27 [REDACTED] Ex. 65 at 85:21–
 28 96:10, 97:2–15 (Levenson Tr.). Facebook was worried about users switching to Google+ and [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Economides ¶¶ 346–47. Another PSN, MeWe, tried to differentiate
 4 itself from Facebook in terms of its data practices by collecting no data and showing no ads. MeWe’s
 5 founder, Mark Weinstein, explained that [REDACTED]
 6 [REDACTED]
 7 [REDACTED] Ex. 71 at
 8 284:22–289:3 (Weinstein Tr.); Ex. 72 at 41:15–43:8, 61:17–64:13, 68:17–70:15, 74:14–75:10,
 9 77:20–78:14 (Weinstein Tr.). Facebook’s COO explained [REDACTED]
 10 [REDACTED]
 11 [REDACTED] Ex. 66 (Olivan Tr.) at 56:21–57:3. They never had the
 12 chance, due to Facebook’s deception.

13 **C. Evidence of Impact and Damages Is Common to All Consumer Class Members**

14 **1. Facebook’s Deception Harmed All Consumer Class Members**

15 Substantial common evidence also demonstrates the Consumer Class’s harm flowing from
 16 Facebook’s anticompetitive conduct. Although Facebook does not charge users a monetary price, it
 17 is not “free.” “Zero price” markets are a common concept in economics, and product sales in such
 18 markets still involve an exchange of consideration; just one that is slightly different than a
 19 “traditional” sale. Farrell ¶¶ 54-58. In Facebook’s case, its “effective price” is users providing their
 20 data in exchange for use of its PSN. Economides ¶¶ 61, 64, 370; Economides Reply ¶¶ 178, 180.
 21 Facebook’s co-founder, Chris Hughes, confirmed it “is not actually free,” “[w]e pay . . . with our data
 22 and our attention,” and “it doesn’t come cheap.” Ex. 3 (CONSUMER-FB-0000002291 at -298).

23 Economic logic and theory show that when consumers have competitive alternatives, sellers
 24 are forced to lower their prices to maintain market share, and that if they do not, they will lose
 25 customers. Economides ¶ 370. And when the beginning price is “zero,” economic theory predicts that
 26 additional competition should drive the price negative, meaning the user receives compensation for
 27 their data or use of the service. *Id.*; Economides Reply ¶ 180.

28 Facebook provides its users a uniform pricing structure in the actual world: its monopoly

1 power allows it to offer users of its personal social network no monetary compensation for their data.
 2 That price is *not* subject to individual negotiation or other complexities—the compensation for *all*
 3 Consumer Class members is zero. Economides Reply ¶ 180. Because the but-for world absent
 4 Facebook’s anticompetitive conduct would have included compensation to all Consumers (regardless
 5 of their personal views on data), *all* Consumer Class members have been harmed by Facebook’s
 6 anticompetitive conduct. Economides ¶¶ 396–401; Economides Reply ¶¶ 177–80.

7 In the but-for world, this compensation would have been “flat” and “market-wide.”
 8 Economides ¶ 409. That is consistent with the actual world, where Facebook offers the same terms—
 9 including price—to Class members across the board, *including* when it and other companies pay
 10 users for their data. Economides ¶¶ 399–400 452–55; Ex. 60 at 12:6–13:10, 15:25–16:9, 19:4–11
 11 (Ben-Zedeff 30(b)(6) Tr.); Ex. 75 at 281:25–282:15 (Tucker Tr.) [REDACTED]

12 [REDACTED]

13 **2. Consumers’ Damages Model Calculates Both Class-Wide and Individual** 14 **Damages Using Real-World, Common Data**

15 Using these fundamental pieces of economic logic, Dr. Economides uses the commonly-
 16 accepted “yardstick” methodology to calculate damages. Looking at Facebook’s own programs, as
 17 well as ten other separate yardsticks, where users are compensated for data, Dr. Economides
 18 calculates a monthly price for the cost of data in the but-for world. Dr. Economides first considers
 19 programs where Facebook itself paid users for their data. Economides ¶¶ 375–83, 409–14. Facebook’s
 20 “Research App” paid users [REDACTED] and Facebook’s “Study” service [REDACTED]
 21 [REDACTED]. See Exs. 58 (describing compensation), 57, 10. Those
 22 instances were more limited than competition would have required in the but-for world, but they
 23 demonstrate the exact defendant engaging in the exact behavior Consumers allege would have
 24 occurred in the but-for world, *i.e.*, ascribing a definitive value to data from users and compensating
 25 them for it. In addition, Dr. Economides considers yardsticks from other major companies that pay
 26 users for their data. These ten other real-world yardsticks include companies like Google, Nielsen,
 27 Comscore, and Amazon. Economides ¶¶ 411–53, Table D1. Dr. Economides explains why these
 28 twelve total programs are appropriate yardsticks, including because of the comparability of the data
 Facebook collects from its users (and pays a monopoly price of \$0 for) and the data the yardsticks

1 collect and pay users for. *E.g.*, Economides ¶¶ 408–11; Economides Reply ¶¶ 141–53, 173.

2 Given Facebook’s demonstrated preference for flat pricing in the actual world, Dr.
3 Economides then utilizes these real-world yardsticks and the well-accepted yardstick methodology to
4 calculate a \$5.00 per month market price of user data. Economides § XII. To be conservative, he also
5 calculated 25th and 75th percentile market prices of \$3.50 and \$7.00 per month, based on the range
6 of real-world yardsticks identified in discovery here. *Id.* ¶¶ 450–51. Once he had a monthly price for
7 user data, it was a simple question for Dr. Economides to calculate the Class’s aggregate damages.
8 Economides § XII(C). He did so by adding up the numbers of monthly active users Facebook reported
9 for each month of each year of the Consumer Class Period, and then multiplied that number by the
10 market price he calculated. Economides ¶¶ 461–63. Although not yet required, Dr. Economides also
11 showed how individual damages could be calculated with this common method. *Id.* ¶ 464.

12 **IV. LEGAL STANDARDS**

13 The Supreme Court has long recognized that class actions play a vital role in private
14 enforcement of the antitrust laws. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972).
15 Class certification requires plaintiffs to demonstrate that Rule 23(a) is met, namely, that there are
16 “questions of law or fact common to the class,” and the requirements of “numerosity, typicality and
17 adequacy of representation” are also met. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods*
18 *LLC*, 31 F.4th 651, 663 (9th Cir.) (2022) (en banc). Plaintiffs must next, by a “preponderance of
19 evidence” show the class fits into one of three categories of Rule 23(b). *Id.* at 665. And while the
20 Court’s “class certification analysis must be ‘rigorous’ and may entail some overlap with the merits
21 of the plaintiff’s underlying claim, . . . [m]erits questions may be considered to the extent—but only
22 to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class
23 certification are satisfied.” *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66
24 (2013). As this Court has explained, “[t]he class certification procedure is decidedly not an alternative
25 form of summary judgment or an occasion to hold a mini-trial on the merits.” *In re Capacitors*
26 *Antitrust Litig.*, 2018 WL 5980139, at *10 (N.D. Cal. Nov. 14, 2018) (Donato, J.).

27 **V. THE CONSUMER CLASS SATISFIES RULE 23(A)**

28 *The Class is Sufficiently Numerous.* The Consumer Class here, in the millions, easily satisfies

1 the first Rule 23(a) factor, numerosity. Economides ¶ 461; *Ochoa v. McDonald's Corp.*, 2016 WL
 2 3648550, at *4 (N.D. Cal. July 7, 2016) (Donato, J.) (“40 or more members” sufficient).

3 ***Common Questions of Law and Fact Exist.*** Rule 23(a)(2) requires that “there are questions
 4 of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality exists where the claims
 5 at issue “depend upon a common contention” whose “determination of its truth or falsity will resolve
 6 an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc.*
 7 *v. Dukes*, 564 U.S. 338, 350 (2011). For commonality, not “every question in the case, or even a
 8 preponderance of questions” need be “capable of classwide resolution.” *Jimenez v. Allstate Ins. Co.*,
 9 765 F.3d 1161, 1165 (9th Cir. 2014). Instead, “even a single common question will do.” *Id.* at 1052.

10 Facebook acknowledges that Consumers’ antitrust claims raise **numerous** questions common
 11 to all class members. Specifically, Facebook’s experts have conceded that all of the following
 12 questions are common to the Class: (1) market definition; (2) monopoly power; (3) the existence of
 13 barriers to entry; and (4) the failed attempts by Facebook’s rivals to enter the market. Tucker ¶ 25. As
 14 in other antitrust class actions, these issues are all common to the Class. *See In re Live Concert*
 15 *Antitrust Litig.*, 247 F.R.D. 98, 117 (C.D. Cal. 2007) (commonality met due to existence of “common
 16 issues such as market definition, monopoly power, anticompetitive conduct, and ca[u]sal antitrust
 17 injury”); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013) (similar,
 18 because “[a]ntitrust liability alone constitutes a common question”).

19 ***The Named Plaintiffs’ Claims are Typical of the Class.*** Rule 23(a)(3) requires that “the
 20 claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed.
 21 R. Civ. P. 23(a)(3). “The requirement is permissive, such that representative claims are ‘typical’ if
 22 they are reasonably coextensive with those of absent class members; they need not be substantially
 23 identical.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (cleaned up). Typicality is
 24 “established by plaintiffs and all class members alleging the same antitrust violation by the
 25 defendants.” *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 649 (N.D. Cal. 2007). Here, the named
 26 Consumers have used Facebook since December 3, 2016, just like the remainder of the proposed
 27 Consumer Class. *See* Klein Decl. ¶ 3; Grabert Decl. ¶ 3; Banks Kupcho Decl. ¶ 3. They and the rest
 28 of the proposed Class bring the same antitrust claims, against the same defendant, based on the same

1 conduct and legal theories, resulting in the same type of injury. This renders the named Consumers’
 2 claims typical of the Class they seek to represent. *See, e.g., Live Concert*, 247 F.R.D. at 117; *Giuliano*
 3 *v. Sandisk Corp.*, 2015 WL 10890654, at *14 (N.D. Cal. May 14, 2015).

4 ***Named Plaintiffs Will Adequately Represent the Class.*** Rule 23(a)(4) requires that “the
 5 representative parties . . . fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
 6 23(a)(4).⁵ Courts in the Ninth Circuit examine whether the representative plaintiffs have any conflicts
 7 of interest with class members and will prosecute the action vigorously on behalf of the class. *Staton*
 8 *v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Each named Consumer satisfies these requirements.
 9 There are no speculative, let alone actual, conflicts between them and the Class. *See* Klein Decl. ¶ 7;
 10 Grabert Decl. ¶ 7; Banks Kupcho Decl. ¶ 7; *cf. Brickman v. Fitbit, Inc.*, 2017 WL 5569827, at *3 n.2
 11 (N.D. Cal. Nov. 20, 2017) (Donato, J.) (Class certification “should not be denied on the basis of
 12 speculative conflicts.”). Instead, all interests are aligned. Each named Consumer has each vigorously
 13 prosecuted this case, investing significant time in, and resources to, advancing the Consumer Class’s
 14 claims. Each has also responded to Facebook’s voluminous discovery requests, produced thousands
 15 of documents from their files, sat for deposition (including, in one named Consumer’s case, shortly
 16 before giving birth), and actively participated in the litigation by reviewing pleadings and discovery
 17 and consulting with counsel. *See* Klein Decl. ¶¶ 8–10; Grabert Decl. ¶¶ 8–10; Banks Kupcho Decl.
 18 ¶¶ 8–10. That commitment amply demonstrates their adequacy. *In re TFT-LCD (Flat Panel) Antitrust*
 19 *Litig.*, 267 F.R.D. 583, 595 (N.D. Cal. 2010).

20 **VI. COMMON QUESTIONS PREDOMINATE UNDER RULE 23(B)(3)**

21 Certifying a damages class pursuant to Rule 23(b)(3) requires that “questions of law or fact
 22 common to class members predominate over any questions affecting only individual members.” Fed.
 23 R. Civ. P. 23(b)(3). Predominance is ***not*** a “matter of nose-counting,” and certification under Rule
 24 23(b)(3) may be proper “even though other important matters will have to be tried separately.” *Ruiz*
 25 *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016); *Tyson*, 577 U.S. at 453.
 26 Consumers must show that ***questions*** common to the Consumer Class predominate, “not that those
 27 questions will be answered, on the merits, in favor of the Class.” *Amgen*, 568 U.S. at 459.

28 ⁵ Adequacy of counsel is now examined under amended Rule 23(g). *See* Section VIII, *infra*.

1 Consumers have detailed the evidence, common to the Class, supporting the elements of their
 2 Section 2 claim above in their proffer of evidence. *See* Section III, *supra*. Consumers briefly review
 3 the elements of their monopolization claim here, including (1) Facebook’s monopoly power; (2)
 4 Facebook’s willful acquisition or maintenance of that power; and (3) causal antitrust injury.
 5 *Qualcomm*, 969 F.3d at 990. Courts “routinely certif[y] classes alleging that a monopolist’s conduct
 6 caused a direct and uniform overcharge, as overcharge cases often rely on facts common across the
 7 class such as the existence of a relevant market, the defendant’s monopoly power, and the existence
 8 of the illegal course of conduct.” 6 Newberg and Rubenstein on Class Actions § 20:28 (6th ed.).

9 **A. Facebook’s Monopoly Power in the Personal Social Network Market Is an**
 10 **Undisputed Common Question**

11 Facebook concedes both that market definition and monopoly power, the first element of
 12 Consumers’ monopolization claim, may be proven through evidence common to the Class.
 13 Consumers put forth two esteemed economists—Drs. Economides and Farrell—who both,
 14 independently, offer opinions supporting the PSN Market. *See* Section III(A), *supra*. Facebook has
 15 accepted these analyses for the purposes of class certification, offering no expert evidence in response.
 16 Tucker ¶ 25. Moreover, reams of common proof, including documents, data, and testimony of
 17 Facebook, non-parties, and their current and former employees support this definition. *See*
 18 Economides ¶¶ 72–206; Section III(A), *supra*. It is, thus, undisputed that common questions
 19 regarding market definition and monopoly power predominate.

20 **B. Common Proof Demonstrates Facebook’s Anticompetitive Deception**
 21 **Regarding Its Data Practices**

22 A large focus of any trial will be Facebook’s anticompetitive, market-wide deception
 23 regarding its data practices. The underlying facts regarding Facebook’s deception, the application of
 24 the law to those facts, and the ultimate determination whether Facebook’s deception violates the
 25 Sherman Act are all common questions that are the same for all members of the Consumer Class. *See*
 26 *In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 611 (N.D. Cal. 2009)
 27 (“Common liability issues such as . . . monopolization have, almost invariably, been held to
 28 predominate over individualized issues”). They will all be resolved using common evidence. *See In*
re Glumetza Antitrust Litig., 336 F.R.D. 468, 475 (N.D. Cal. 2020) (noting that “Section 2

monopolization claims readily lend themselves to common evidence”).

First, common evidence will prove that Facebook has made a series of representations and omissions regarding its data practices that were deceptive and meant to induce reliance. The same documents—*e.g.*, press releases, blog posts, transcripts, and Facebook’s own documents and testimony—will be used to prove what Facebook said (or did not say) to the market regarding its data practices, whether they were accurate or misleading, and why Facebook made them. *See* Exhibit Ex. 17 (summary of misrepresentations and omissions made by Facebook during the conduct period); Section III(B), *supra*; Economides ¶¶ 27–29, 285–316; *cf. Giuliano*, 2015 WL 10890654, at *17 (common questions regarding defendant’s deception predominated for fraud-based Section 2 claim since “[p]laintiffs will rely on common evidence . . . to show that the Disputed Patents were fraudulently procured”); *Jabbari v. Farmer*, 965 F.3d 1001, 1007 (9th Cir. 2020) (“common questions, such as ‘whether the fuel economy statements were in fact accurate’ and ‘whether defendants knew that their . . . statements were false or misleading’” predominate) (cleaned up).

Second, common questions predominate regarding whether Facebook’s deceptive statements and omissions harmed competition. The key economic questions are (a) whether *enough* users care about a personal social network’s data practices to a sufficient degree to make them a competitive driver, and (b) whether Facebook’s deception about its own practices therefore harmed competition. *E.g.*, Economides ¶ 400–01; Tucker ¶ 31. Common evidence demonstrates this is clearly the case in the relevant market here—indeed, Facebook was petrified about even small numbers of its users expressing concerns regarding its data practices. For example, [REDACTED]

[REDACTED]

[REDACTED]

Ex. 76 (PALM-016440640 at -644, -647); Ex. 77 (PALM-016440707 at -708); *see also* Ex. 31 at -779 [REDACTED]

[REDACTED] Facebook’s expert, Dr. Tucker, stated

[REDACTED] Ex. 75 at 263:13–265:2 (Tucker Tr.). That is consistent with the

percentage of the market that need be affected in other antitrust contexts, like exclusive dealing. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004) (30 or 40 percent foreclosure level could “be of concern”). And, here, it makes perfect sense why the rates need only be so relatively low: losing just 20–30% of users to a competitor is massively problematic for a company that relies heavily on direct network effects.

In other non-antitrust contexts, where the standard is different because the relevant legal question is whether an entire audience, rather than a sufficient sub-set, is likely to find an item to be material—such as in securities, Lanham Act, and consumer protection cases—the case law demonstrates not only that materiality is an objective inquiry,⁶ but evidence that less than the entire population (such as between 50 and 60%, or even 20%) finding something material is sufficient.⁷ Even assuming these non-antitrust standards apply, Consumers more than meet them. For example, Facebook’s own surveys have shown 84% of users “are concerned about the information they share on Facebook,” and an average of 80% of consumers reported in Mr. Klein’s survey agreed that knowing data practices at issue in this case are important to their use of a social network. *See* Section III(B)(2), *supra*. Prof. Lamdan noted that extensive record evidence and academic research all show that consumers deeply care about privacy, prefer less data collection and use over more, and that Facebook was aware of these preferences. Lamdan ¶¶ 13–82; Lamdan Reply ¶¶ 25–33. Moreover, Facebook users demonstrated the importance of data and privacy to them when, in Apple’s real-world “ATT” experiment, nearly █████ of U.S. users decided to prevent Facebook from tracking them when given the choice. Ex. 54 (PALM-017069195 at -197). Mr. Zuckerberg also recognized “[t]he **No. 1 thing that people care about is privacy and handling of their data.**” Ex. 11 at 5.

And *finally*, Facebook’s continuous course of anticompetitive conduct had a clear impact on

⁶ Materiality is an objective inquiry. *See Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988) (explaining fraud-on-the-market theory); *Amgen*, 568 U.S. at 460, 67 (materiality is objective inquiry for which common questions predominate since “the class . . . will prevail or fail in unison”).

⁷ *E.g., Beltran v. Avon Prod., Inc.*, 2012 WL 12303423, at *7 (C.D. Cal. Sept. 20, 2012) (surveys showing 72% and 61% of respondents supported plaintiffs’ claims satisfied materiality in consumer protection case); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1018 (C.D. Cal. 2015) (common questions of materiality predominated based on survey results of 59% and 65%, and suggesting survey showing “only 24% of consumers would behave differently” could raise triable issue).

1 rivals. The testimony in this case is clear, and Dr. Economides explains how Facebook’s privacy and
 2 data (false) promises were critical to the defeat of competitors such as Myspace, Google+ and MeWe.
 3 Economides ¶¶ 322–57; Economides Reply ¶¶ 62–80; *see also* Section III(B)(6), *supra*.

4 **C. Common Proof Demonstrates Class-Wide Impact and Damages**

5 Common evidence and analysis will also be used to prove that Facebook’s anticompetitive
 6 deception has harmed all Consumer Class members and to calculate both aggregate and individual
 7 damages. Facebook’s uniform pricing to all class members simplifies the antitrust impact analysis.

8 Dr. Economides shows Facebook’s pricing in the actual world (\$0) is flat across all Facebook
 9 users and there is no individual negotiation. Economides Reply ¶¶ 178–80. In the real-world situations
 10 where Facebook *has* compensated users for their data, it similarly did so in a flat manner; *i.e.*, paying
 11 all users the same amount. *Id.* ¶ 115; Ex. 60 at 15:25–16:9, 19:4–11 (Ben-Zedeff 30(b)(6) Tr.). The
 12 common evidence further shows that other companies similarly prefer a flat model when
 13 compensating users for data, which makes intuitive sense given it simplifies execution and
 14 explainability, avoids fairness issues associated with price discrimination, and minimizes
 15 administrative costs. Economides ¶¶ 399, 409–10, 452–54; Economides Reply ¶¶ 112–24.

16 Increased competition in the but-for world would have required Facebook to compensate all
 17 its users for their data, regardless of their individual preferences on data collection and use.
 18 Economides ¶ 401 & Economides Reply ¶¶ 178–80. All Class members pay an effective overcharge
 19 by receiving Facebook’s monopoly price of \$0. In this way, all Class members are harmed by the lack
 20 of market-wide compensation for their data that Facebook was able to deprive them of, no matter
 21 their individual views. *Cf. In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444, at *9 (N.D.
 22 Cal. Feb. 8, 2016) (where claimed damages in antitrust case are for overcharge, “focus on the
 23 subjective desires of individual consumers is misplaced” because “[t]he harm lies in paying more than
 24 the product is objectively worth, and does not turn on the individual user’s desire or lack of desire for
 25 a specific feature.”). Proving antitrust impact in this case is therefore “straightforward” and common
 26 questions predominate. *In re Wholesale Grocery Prod. Antitrust Litig.*, 2012 WL 3031085, at *9 (D.
 27 Minn. July 25, 2012) (explaining “gas stations typically charge a single price for diesel fuel” and “the
 28 price does not vary among customers” such that “if a gas station were able to monopolize the diesel

1 market and elevate the price of diesel above its competitive level, proving common impact would”
 2 merely require “showing the price of diesel but for the gas station’s monopoly would have been
 3 lower” and that customer “purchased diesel at the elevated price”).

4 Classwide damages are similarly clear-cut. In the but-for world, the common record shows
 5 Facebook would have implemented a flat pricing model to compensate users on a monthly basis.
 6 Economides ¶¶ 409, 452–54; Economides Reply ¶¶ 112–89. Based on real world yardsticks
 7 (including what Facebook has paid users for their data), Dr. Economides estimated the monthly price
 8 Facebook would have paid its users and then multiplied that price by the amount of monthly users
 9 and the time of the Consumer Class period. Economides ¶¶ 456–63. This straightforward model relies
 10 on no complicated econometric analyses, convoluted theories, or internally-implausible
 11 assumptions—it is an application of direct evidence from Facebook itself about a payment model
 12 Facebook (and multiple others) employed, and which comports fully with Consumers’ core antitrust
 13 liability theory and proof. This is the essence of a classwide damages model the Consumer Class can
 14 use at trial, thus further underscoring predominance under Rule 23(b)(3). *E.g., In re Nat’l Football*
 15 *League’s Sunday Ticket Antitrust Litig.*, 2023 WL 1813530, at *8, *12 (C.D. Cal. Feb. 7, 2023)
 16 (noting yardstick damages method “is an accepted methodology in antitrust cases” and suffices to
 17 establish common damages questions predominate for Rule 23(b)(3) purposes).⁸

18 **VII. SUPERIORITY IS SATISFIED**

19 Rule 23(b)(3) also requires that a class action be “superior to other available methods for fairly
 20 and efficiently adjudicating the controversy.” In making this determination, courts consider “a non-
 21 exhaustive list of factors relevant to the superiority inquiry.” *Bateman v. Am. Multi-Cinema, Inc.*, 623
 22 F.3d 708, 713 (9th Cir. 2010). Each favors certifying the Consumer Class.

23 **First**, where each putative class member suffers relatively small damages, this factor weighs
 24 in favor of class treatment. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001).

25 _____
 26 ⁸ See also *In re Nw. Airlines Corp. Antitrust Litig.*, 197 F. Supp. 2d 908, 928 (E.D. Mich. 2002)
 27 (yardsticks “need not be wholly identical,” just “somewhat comparable”); *Dial Corp. v. News Corp.*,
 28 314 F.R.D. 108, 118–19 (S.D.N.Y. 2015) (“selection of perfectly comparable” yardsticks
 “impossible” as defendant’s “alleged monopoly prevents comparable firms from operating within
 its market”); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1221 (9th Cir. 1997)
 (whether proposed yardstick “properly compares to the relevant market presents” jury question).

1 That is the case here, where individual Consumer Class members’ damages likely range from \$5 to
 2 \$240 each. Economides ¶ 464. The costs of litigating this complex antitrust case and doing so against
 3 Facebook—with its endless monetary and attorney resources—also make class treatment superior. *In*
 4 *re Facebook Biometric Info. Priv. Litig.*, 326 F.R.D. 535, 548 (N.D. Cal. 2018) (Donato, J.).

5 **Second**, “the extent and nature of any litigation concerning the controversy already begun by
 6 or against class members” likewise favors certifying the Consumer Class. *See* Fed. R. Civ. P.
 7 23(b)(3)(B). Consumers are not aware of any other litigation by or against Consumer Class members
 8 concerning Facebook’s monopolization of the PSN Market via anticompetitive deception.

9 **Third**, continuing to concentrate these claims before this Court in the Northern District of
 10 California would promote judicial efficiency and fairness. Fed. R. Civ. P. 23(b)(3)(C). Facebook is
 11 headquartered in this District and maintains a forum selection clause requiring litigation in this
 12 District. The Court has also presided over this case for nearly three years.

13 **Finally**, no inherent difficulties undermine maintaining Consumers’ case as a class action.
 14 Fed. R. Civ. P. 23(b)(3)(D). To the contrary, **not** certifying the Consumer Class and requiring each
 15 class member to proceed individually would compound manageability difficulties for the parties and
 16 the Court by creating potentially millions of duplicative individual lawsuits.

17 **VIII. THE COURT SHOULD APPOINT CO-LEAD INTERIM CONSUMER CLASS**
 18 **COUNSEL AS CO-LEAD CONSUMER CLASS COUNSEL**

19 Consumers respectfully request that, pursuant to Rule 23(g), the Court appoint Mr. Teruya of
 20 Quinn Emanuel and Ms. Scarlett of Hagens Berman as Co-Lead Consumer Class Counsel. Mr.
 21 Teruya, Ms. Scarlett, and their respective firms have significant expertise and experience in complex
 22 class actions and antitrust litigation, and they all have worked cooperatively and extensively in
 23 vigorously advancing the Class’s interests. Teruya Decl. ¶¶ 14–40, Scarlett Decl. ¶ 1–9. If appointed
 24 as Co-Lead Counsel, Mr. Teruya and Ms. Scarlett will continue to zealously litigate this case.

25 **IX. CONCLUSION**

26 Accordingly, Consumers respectfully request that the Court certify the proposed Consumer
 27 Class, appoint the named Consumers as class representatives, and appoint Co-Lead Class Counsel.
 28

DATED: September 15, 2023

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ATTESTATION OF KEVIN Y. TERUYA

This document is being filed through the Electronic Case Filing (ECF) system by attorney Kevin Y. Teruya. By his signature, Mr. Teruya attests that he has obtained concurrence in the filing of this document from each of the attorneys identified on the caption page and in the above signature block.

Dated: September 15, 2023

By /s/ Kevin Y. Teruya
Kevin Y. Teruya

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2023, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System, causing it to be electronically served on all attorneys of record.

By /s/ Kevin Y. Teruya
Kevin Y. Teruya